STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 10, 2013
v	No. 309315 Washtenaw Circuit Court
RAYMOND CHARLES PIERSON, Defendant-Appellant.	LC No. 10-001241-FH

Before: SAWYER, P.J., and METER and DONOFRIO, JJ.

PER CURIAM.

Defendant appeals as of right his convictions by a jury of of first-degree home invasion, MCL 750.110a(2); felon in possession of a firearm, MCL 750.224f; possession of a firearm during the commission of a felony, second offense (felony-firearm 2d), MCL 750.227b; and resisting and obstructing a police officer, MCL 750.81d(1). The trial court sentenced him as a fourth-offense habitual offender, MCL 769.12, to prison terms of 120 to 300 months for first-degree home invasion, 12 to 60 months for felon in possession of a firearm, five years for felony-firearm 2d, and 12 to 60 months for resisting arrest. We affirm.

I. BASIC FACTS

Deputy Sean Urban was patrolling the Bryn Mawr Apartment Complex in Washtenaw County during the early morning hours of July 25, 2010. As he was patrolling, Deputy Urban heard a commotion near the center of the complex. As the deputy approached the area, he observed two persons, later identified as defendant and Corey Taylor, on the ground in a physical altercation. Taylor was on top of defendant, and both defendant and Taylor had their hands on a firearm, which Deputy Urban identified as an AK-47.

Deputy Urban radioed for backup and then approached the individuals. As he approached, both individuals stood up. Taylor put his hands in the air, but defendant started walking away. Defendant initially ignored Deputy Urban's verbal command to stop, but did eventually stop and placed his hands behind his back. Deputy Urban grabbed defendant's hands to place him in handcuffs, and defendant jerked away and started running. Deputy Urban pursued defendant and discharged a taser. The probes hit defendant in the back, and defendant fell to the ground. Deputy Urban then placed defendant in handcuffs and took him into custody. As Deputy Urban was escorting defendant to his patrol vehicle, defendant said, "I broke into the house but the guy had the gun."

Deputy Urban turned defendant over to Deputy Daniel Buffa, who had just arrived on the scene. Deputy Buffa secured defendant in the backseat of his patrol vehicle and then advised defendant of his *Miranda*[1] rights. Defendant agreed to waive his rights and talk to Deputy Buffa. Defendant admitted that he broke into Taylor's apartment but denied that the firearm was his. Defendant maintained that that Taylor confronted him with the firearm when he entered the apartment. Deputies later discovered a vehicle in the parking lot that was registered to a woman with the same address as defendant. In the vehicle they found a black bag with two ammunition magazines, both of which fit the AK-47. When confronted with this information, defendant admitted that the firearm was his. Defendant told Deputy Buffa that Taylor was a drug dealer and that he went to Taylor's apartment with the firearm, intending to rob him.

Later that day, defendant was interviewed by Detective Grant Toth. Defendant gave Detective Toth a different version of events. Defendant told Detective Toth that Taylor was a drug dealer, and that Taylor called defendant and asked for a ride. Defendant stated that when he arrived at Taylor's apartment, Taylor placed a bag in his car and then went back to his apartment to get a shirt. Defendant stated that he opened the bag and discovered the firearm. Defendant told Detective Toth that he confronted Taylor about the firearm, at which point they began to fight. Based in part on defendant's statements, Detective Toth procured a search warrant for Taylor's apartment. During the search, police found a digital scale, Vicodin, ecstasy, several small bags of marijuana, $5,300 in cash, and a substance used to cut cocaine.

II. VOUCHING/BOLSTERING WITNESS CREDIBILITY

Defendant first argues that the trial court erred because it allowed the prosecutor to ask Detective Toth if the statements defendant made to Deputy Buffa were consistent with the statements defendant made to Detective Toth. After the prosecution rested, defendant called Detective Toth as a witness. During direct examination, Detective Toth testified regarding the statements defendant made when Detective Toth interviewed him. On cross-examination, the prosecutor asked Detective Toth to review a copy of Deputy Buffa's police report, which contained the statements that defendant made to Deputy Buffa. The prosecutor then asked if the statements defendant made to Deputy Buffa were consistent with the statements defendant made to Detective Toth. Detective Toth stated that the two statements were inconsistent. The prosecutor also inquired whether Detective Toth would have included defendant's statements to Deputy Buffa in his search-warrant affidavit had he known of them. Detective Toth stated that he would have, indicating that the prior statement "goes to credibility of the witness."

Defendant argues that Detective Toth improperly vouched for and bolstered Deputy Buffa's credibility and that the prosecutor committed misconduct[2] because he used Detective Toth's testimony in this way. We disagree. It is well recognized that "the prosecutor cannot vouch for the credibility of his witnesses to the effect that he has some special knowledge

[1] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

[2] We review issues of prosecutorial misconduct de novo to determine if the defendant was denied a fair trial. *People v Mann*, 288 Mich App 114, 119; 792 NW2d 53 (2010).

concerning a witness' truthfulness." *People v Bahoda*, 448 Mich 261, 276; 531 NW2d 659 (1995); see also *People v Dobek*, 274 Mich App 58, 66; 732 NW2d 546 (2007). Moreover, "[i]t is generally improper for a witness to comment or provide an opinion on the credibility of another witness because credibility matters are to be determined by the jury." *Dobek*, 274 Mich App at 71.

Detective Toth, however, never commented on Deputy Buffa's credibility. In addition, the prosecutor did not imply through his examination of Detective Toth that the prosecutor had special knowledge concerning Deputy Buffa's truthfulness. The prosecutor did not ask Detective Toth to opine on the veracity or truthfulness of Deputy Buffa or the statements contained in Deputy Buffa's police report. Rather, the prosecutor asked Detective Toth to read Deputy Buffa's police report and compare the statements Deputy Buffa took from defendant to the statements Detective Toth took from defendant. The point of the questioning was not to bolster Deputy Buffa's credibility; it was to highlight the inconsistent statements defendant had made.

We also disagree with defendant's argument that Detective Toth's testimony was inadmissible as hearsay.[3] Detective Toth's testimony was not offered to "prove the truth of the matter asserted." MRE 801(c). That is, Detective Toth's testimony was not offered to prove that the statements defendant made to Deputy Buffa were true but rather to highlight inconsistencies in defendant's statements. It is for this same reason that we reject defendant's argument that Detective Toth's testimony should have been excluded under the best-evidence rule. MRE 1002 provides: "To prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required, except as otherwise provided in these rules or by statute." As noted, Detective Toth's testimony was not offered to prove the contents of Deputy Buffa's police report. Therefore, the best-evidence rule did not apply.

Defendant also argues that the trial court erred in admitting Detective Toth's testimony because Detective Toth was not present when defendant gave his statement to Deputy Buffa and therefore had no personal knowledge concerning the subject matter of Deputy Buffa's report. This argument is unpersuasive. Detective Toth had personal knowledge of the contents of Deputy Buffa's report because he read the report. After reading Deputy Buffa's report, Detective Toth opined that the statements Deputy Buffa took from defendant were inconsistent with the statements Detective Toth took from defendant. That Detective Toth was not present when defendant made his statement to Deputy Buffa did not preclude him from opining about whether defendant's statements were consistent.

Defendant also argues that the trial court erred because it did not give the jury a cautionary instruction regarding the significance of Detective Toth's testimony.[4] Defendant

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[3] We review the admission of evidence for an abuse of discretion. 486 Mich 596, 606; 786 NW2d 579 (2010).

[4] This claim of error is unpreserved and we thus review it for plain error affecting substantial rights. *People v Jones*, 468 Mich 345, 355; 662 NW2d 376.

argues that a cautionary instruction was needed to instruct the jury concerning the different permissible uses of Detective Toth's factual testimony and his allegedly expert testimony. Defendant, however, fails to specifically identify what testimony from Detective Toth constituted expert testimony. Our review of the record reveals that Detective Toth was never qualified as expert and that he offered allowable testimony under the rules of evidence. There was no need for a cautionary instruction.

III. INSTRUCTION TO DISREGARD PORTIONS OF TESTIMONY

Defendant next argues that the trial court denied him his right to a fair trial because the court instructed the jury to disregard a portion of defendant's cross-examination. We disagree. Whether a defendant was denied his due-process right to a fair trial presents a question of constitutional law that this Court reviews de novo. See *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). A review of the record reveals that the trial court did instruct the jury to disregard a portion of defense counsel's cross-examination of an individual who was with Taylor at the time of the break-in. The witness had been asked about a police report that was not then in evidence. However, once the report was admitted, the court told the jury that the "instruction about disregarding those previous questions no longer . . . applies." Although the jury was given conflicting instructions on the matter, the court made it clear that its previous instruction about disregarding had been rescinded. Jurors are presumed to follow their instructions, *People v Abraham*, 256 Mich App 265, 279; 662 NW2d 836 (2003), and reversal is not warranted.

IV. MISSING-WITNESS INSTRUCTION

Defendant next argues that the trial court erred when it refused to give the missing-witness instruction, CJI2d 5.12,[5] to the jury. The prosecution included Taylor, the victim, on its witness list. However, Taylor's attorney contacted the prosecutor's office before trial and indicated that Taylor would assert his Fifth Amendment right against self-incrimination if called to the stand. The trial court excused Taylor and denied defendant's request for the missing-witness instruction. Defendant argues that the trial court's ruling was erroneous and denied him his right to a fair trial. We disagree. "Issues of law arising from jury instructions are reviewed de novo on appeal, but a trial court's determination whether an instruction was applicable to the facts of the case is reviewed for an abuse of discretion." *People v Waclawski*, 286 Mich App 634, 675; 780 NW2d 321 (2009).

Defendant was not entitled to the missing-witness instruction. MCL 767.40a(3) provides that "[n]ot less than 30 days before the trial, the prosecuting attorney shall send to the defendant or his or her attorney a list of the witnesses the prosecuting attorney intends to produce at trial." Once a witness is endorsed under MCL 767.40a(3), the prosecution must exercise due diligence

[5] CJI2d 5.12 reads:

> *[State name of witness]* is a missing witness whose appearance was the responsibility of the prosecution. You may infer that this witness's testimony would have been unfavorable to the prosecution's case.

to produce him at trial. *People v Eccles*, 260 Mich App 379, 388; 677 NW2d 76 (2004). If the prosecutor fails to produce an endorsed witness, the missing-witness instruction may be appropriate. *People v Perez*, 469 Mich 415, 420; 670 NW2d 655 (2003); *People v Cook (On Remand)*, 266 Mich App 290, 293 n 4; 702 NW2d 613 (2005). The instruction is not required, however, if an endorsed witness has been properly excused by the trial court. See, e.g., MCL 767.40a(4).

In the present case, the trial court properly excused Taylor based on his assertion of his Fifth Amendment privilege. "A lawyer may not . . . call a witness knowing that he will claim a valid privilege not to testify." *People v Giacalone*, 399 Mich 642, 645; 250 NW2d 492 (1977); see also *People v Dyer*, 425 Mich 572; 390 NW2d 645 (1986). Further, "[w]hen a judge determines . . . that the witness [intimately related to the criminal episode at issue] will either properly or improperly claim the protection against self-incrimination, he must not allow this witness to be called to the stand." *People v Poma*, 96 Mich App 726, 733; 294 NW2d 221 (1980). Because Taylor indicated his intent to invoke his Fifth Amendment right against self-incrimination, the trial court properly excused him and denied defendant's request for the missing-witness instruction.

V. MOTION TO SUPPRESS

Defendant's final argument is that the trial court erred when it denied his motion to suppress his statements to Deputy Buffa. This Court reviews de novo a trial court's ultimate decision regarding a motion to suppress, but reviews a trial court's factual findings for clear error. *People v Williams*, 240 Mich App 316, 319; 614 NW2d 647 (2000). "A finding is clearly erroneous if, after reviewing the entire record, an appellate court is left with a definite and firm conviction that a mistake has been made." *People v Coomer*, 245 Mich App 206, 219; 627 NW2d 612 (2001).

Under both the United States and Michigan Constitutions, criminal defendants have a right against self-incrimination. US Const, Am V; Const 1963, art 1, § 17. *Miranda*, 384 US at 444-459 requires that police "Mirandize" every individual before subjecting them to custodial interrogation.

> The now-familiar *Miranda* warnings require the police, before a custodial interrogation, to inform a suspect (1) that he has the right to remain silent, (2) that anything he says can and will be used against him in court, (3) that he has a right to the presence of an attorney during any questioning, and (4) that if he cannot afford an attorney one will be appointed for him. [*People v Daoud*, 462 Mich 621, 624 n 1; 614 NW2d 152 (2000).]

During the suppression hearing, Deputy Buffa testified that he advised defendant of his *Miranda* rights and that defendant stated that he understood them and agreed to waive them. Defendant, in contrast, testified that he was never advised of his rights. Moreover, defendant denied making any statements. The trial court concluded that, assuming defendant made a statement, it was accompanied by a satisfactory warning under *Miranda*. In light of the conflicting testimony, and the court's ability to assess the credibility of the witnesses appearing before it, the court's conclusion was not clearly erroneous.

Defendant also appears to take issue with a short break that occurred during Deputy Buffa's interview. Deputy Buffa interviewed defendant for approximately five to ten minutes, took a five-to-ten-minute break, and then resumed questioning. Deputy Buffa did not re-advise defendant of his *Miranda* rights upon resuming questing. However, "[t]he police are not required to read *Miranda* rights every time a defendant is questioned." *People v Littlejohn*, 197 Mich App 220, 223; 495 NW2d 171 (1992). "[T]he failure to reread a defendant's *Miranda* rights prior to each interrogation does not render his subsequent statements inadmissible as evidence against him. Rather, a factual question is raised as to whether the statements were voluntary." *People v Godboldo*, 158 Mich App 603, 607; 405 NW2d 114 (1986). In the present case, there is no indication that defendant's second statement to Deputy Buffa was involuntary as a result of the short break in questioning.

Affirmed.

/s/ David H. Sawyer
/s/ Patrick M. Meter
/s/ Pat M. Donofrio